

1992

State of Utah v. Robert Alan Phillips : Brief of Appellant

Utah Court of Appeals

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DOCKET NO. 920693 IN THE COURT OF APPEALS

STATE OF UTAH

92-0693-CA

STATE OF UTAH,

Plaintiff/Appellee,

v.

ROBERT ALAN PHILLIPS

Defendant/Appellant.

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APPELLANT'S BRIEF

Case No. 92-0693-CA

Priority 2

AN APPEAL FROM A DECISION OF THE THIRD
JUDICIAL DISTRICT COURT OF SALT LAKE
COUNTY, STATE OF UTAH, THE HONORABLE
MICHAEL MURPHY PRESIDING.

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FILED

SEP 18 1992

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UTAH

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AUG 18 1992

COURT

IN THE COURT OF APPEALS

STATE OF UTAH

STATE OF UTAH,

Plaintiff/Appellee,

v.

ROBERT ALAN PHILLIPS

Defendant/Appellant.

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APPELLANT'S BRIEF

Case No. 920071-CA

Priority 2

AN APPEAL FROM A DECISION OF THE THIRD
JUDICIAL DISTRICT COURT OF SALT LAKE
COUNTY, STATE OF UTAH, THE HONORABLE
MICHAEL MURPHY PRESIDING.

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IN THE COURT OF APPEALS

STATE OF UTAH

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|----------------------|---|--------------------|
| STATE OF UTAH, | : | |
| | : | |
| Plaintiff/Appellee, | : | |
| | : | APPELLANT'S BRIEF |
| v. | : | |
| | : | |
| ROBERT ALAN PHILLIPS | : | Case No. 920071-CA |
| | : | |
| | : | Priority 2 |
| Defendant/Appellant. | : | |
| | : | |

STATEMENT OF JURISDICTION

This court has jurisdiction to hear this appeal pursuant to Utah Code Ann. section 78-2-2(3)(i) (1953 as amended).

STATEMENT OF THE ISSUES

Whether the trial court erred in denying Defendant's Motion to Withdraw his Guilty Plea in view of absence from the record of facts showing a factual basis upon which to determine and/or admission from the defendant charged with the crime of aggravated murder, that he committed the crime intentionally, an element of the crime with which he is charged. The standard for review is substantial compliance. State v. Hickman, 779 P. 2d 670 (Utah 1989).

DETERMINATIVE STATUTES, ORDINANCES, ETC.

1. Utah Code Ann. section 77-13-6:

A request to withdraw a plea of guilty may be withdrawn only upon good cause and with leave of court.

2. Utah Code Ann. section 76-5-202:

Criminal homicide, murder, first degree:

If actor intentionally or knowingly causes the death of another while engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit aggravated robbery.

STATEMENT OF THE CASE

This is an appeal from an order by the Third District Court of Salt Lake County, Michael Murphy, dated May 12, 1992, which denied Appellant's motion to set aside the guilty plea entered by him some 12 years previously. The plea was entered on June 16, 1980, to a charge of aggravated robbery and murder. On February 18, 1992, the appellant moved to set aside the guilty plea, based on the fact that the trial court, in its colloquy with Appellant at the time the plea was entered, failed to ascertain whether he committed the crime intentionally, since it appears this element of the charge against him was denied.

The matter was heard on March 23, 1992, by Judge Murphy who denied it. The appellant filed his notice of appeal on June 5, 1992.

STATEMENT OF THE FACTS

On or about January 1, 1980, it is alleged that the defendant shot and killed one Everett Hamby in the course of a robbery. He and an accomplice, Kendall Northern, were subsequently arrested in connection with this crime, and the defendant was charged with aggravated robbery and aggravated murder.

Pursuant to negotiations between the defendant and his attorneys and the Salt Lake County Attorney's office, the defendant agreed to plead guilty to the murder charge in return for a promise that the State would not "make an impassioned plea" for the imposition of the death penalty. Accordingly, on June 16, 1980, the plea was entered before the Honorable Christine M. Durham, who at the time was a judge on the Third District Court. During the colloquy between the court and the defendant, the judge made the usual inquiries to determine whether the guilty plea was being entered intelligently and voluntarily; and in addition, the following exchange took place:

THE COURT: All right. Specifically, the Information alleges that on or about January 1, 1980, here in Salt Lake County, you caused the death of Everett Hamby, Jr., while you were engaged in the commission of an aggravated robbery.

THE DEFENDANT: Yes, Ma'am.

THE COURT: Are those facts true and correct?

THE DEFENDANT: Yes, Ma'am.

THE COURT: All right. And did you cause his death knowingly and intentionally at that time?

THE DEFENDANT: Not intentionally. It was accidental. But I was still at fault.

THE COURT: All right.

Transcript of Disposition Hearing (hereinafter Tr.) at pp. 8-9 (emphasis added).

Notwithstanding the above representations, the court accepted the guilty plea and sentenced the defendant to life in prison. (Tr. at 309-10). During his lengthy incarceration, the defendant reconsidered the circumstances surrounding his entry of the guilty plea and decided to move to withdraw it. However, he was unable to find counsel to assist him, notwithstanding reasonable exertions on his part. (See Affidavit of Robert Alan Phillips, paragraph 4).

SUMMARY OF THE ARGUMENT

By failing to ascertain whether the appellant was admitting to the element of intent which is essential to the charge against him, the District Court committed reversible error in accepting the appellant's guilty plea.

ARGUMENT

I. A MOTION TO WITHDRAW A PLEA OF GUILTY MAY BE MADE IF THE DEFENDANT CAN PROVE MANIFEST INJUSTICE.

Withdrawal of a guilty plea in this criminal case was governed by Utah Code Ann. section 77-13-6, which provides as follows:

A request to withdraw a plea of guilty may be withdrawn only upon good cause shown and with leave of court.

The defendant concedes that the 12-year lapse between the entry of his plea and his motion to withdraw it does involve unusual circumstances that justify granting this motion, notwithstanding the lengthy delay in presenting it. Although it is a comparatively rare event, courts have been known to grant motions to withdraw guilty pleas even though made long after sentencing.

In a number of jurisdictions, a post-sentencing motion to withdraw a plea of guilty may be made if the defendant can prove "manifest injustice," a phrase appearing in Rule 32(b) of the Federal Rules of Criminal Procedure and defined as an injustice that is obvious and directly observable, overt, not obscuring. Webster's International Dictionary (1966). This has been found to exist in cases where the defendant was not informed of his right to the assistance of counsel, whether his own or appointed by the court; where the defendant was not informed of possible defenses available to him; and most importantly, in cases where the defendant exhibited doubt concerning his guilt as to some essential element of the offense.

In State v. Taylor, 521 P. 2d 699 (Wash. 1974), the defendant pleaded guilty to a reduced charge of second-degree assault. The lower court granted his motion to withdraw his plea, but on appeal the order was vacated based on the fact that the withdrawal of the defendant's guilty plea was not necessary to correct a "manifest injustice." The Supreme Court in this instance, however, states

that even if the defendant's constitutional rights have been safeguarded when he enters his plea, it may be set aside to correct manifest injustice:

Every effort has been made to ascertain that the plea of guilty is made voluntarily, with understanding and with reasonable knowledge of the important consequences. That being the case, trial courts should exercise greater caution in setting aside a guilty plea once the required safeguards have been employed. Id. at 701.

Such extraordinary rulings have usually been made in cases where the plea was entered under such circumstances as amounted to a violation of the defendant's fundamental constitutional rights. For example,

Where it is established that a defendant has failed to understand the consequences of his plea (Carter v. United States, 113 U.S.App.D.C. 123, 306 F.2d 283 (1962); or, where a defendant was denied effective assistance of counsel (Kadwell v. United States, 315 F.2d 667 (9th Cir. 1963); or, where the plea was induced by threats or promises (Semet v. United States, 369 F.2d 90 (10th Cir. 1966)).

In State v. Taylor, 521 P. 2d 699 (1974), the court agrees that the above text would serve to establish "manifest injustice." The court also states that this is not an exclusive list and if facts presented to the court do not fall within said list, manifest injustice can still be found by a showing of the facts. Ibid. at 702.

A. DEFENDANT WAS NOT FULLY INFORMED OF HIS DEFENSES

If we review the facts in North Carolina v. Alford, 400 U.S. 25 (1970), the defendant entered a plea of guilty while not

factually acknowledging guilt in order to avoid the death penalty. The court found the plea to be a voluntary and knowing one since under the circumstances there was strong evidence of guilt. In Strong v. Turner, 22 Utah 2d 294 (1969), the defendant's plea bargain was not set aside even though his plea to a robbery charge was on the promise that other charges would be dismissed. It was argued that this arrangement constituted undue persuasion and coercion. On appeal, the defendant and his counsel elected not to introduce the record of the original proceeding and presented as fact their own evidence at the habeas corpus proceeding. The Supreme Court of Utah justified its decision by reasoning that:

It is the prerogative of the trial court to judge the credibility of the evidence. While it is true that he should not arbitrarily reject competent, credible, uncontradicted testimony, nevertheless he is not compelled to believe evidence where there is anything about it which would reasonably justify refusal to accept it as the facts, and this includes the self-interest of the witness.

Id. at 295, citing Gagos v. Industrial Commission, 39 P. 2d 697 (1934).

The matter before you differs from Carolina v. Alford, Ibid. in that there is no strong evidence of guilt in this matter. During the course of Appellant's guilty plea hearing, the original record of the proceeding shows that there followed a proffer by defense counsel regarding the facts that existed to establish intent. Evidence produced in the hearing indicated that the defendant fired three shots, but that the first shot -- the one he

states was accidentally fired -- had killed the victim. (Tr. at 166-167). Since intent to kill was an essential element of the prosecution's case, it logically follows that the second and third shots, although intentionally fired, could not have resulted in the crime with which the defendant was charged; and that if the first shot was in fact fired accidentally, the defendant could not be guilty of this specific-intent crime. (Tr. at 166-167). In this connection, it is interesting to note that counsel for the State admitted at the hearing that the killing could have been accidental. (Tr. at 165-166, 171, 191). Defense counsel argued at some length that an inference could be drawn from the facts surrounding the killing that it was accidental. (T. at 198-205).

A large part of the prosecution's case centered around statements made by Kendall Northern, whose credibility was placed in serious question by the prosecutor himself. (Tr. at 169, 171, 186, 196). Northern was shown to be a domineering individual and a pathological liar; and in addition, there is considerable doubt as to whether he in fact saw the fatal shot fired. (Tr. at 179-180).

Appellant's circumstance does not differ from that in State v. Lance, 651 P. 2d 1003 (Mont. 1982), where the defendant pleaded guilty to a charge of custodial interference arising out of his removal of his son from the custody of his ex-wife. The plea was entered on December 18, 1979, and the motion to withdraw the plea

was filed on February 18, 1982. Although the trial court denied the motion, the Montana Supreme Court reversed and remanded on the ground that the trial court, in accepting the plea, had not fully informed the defendant of the defenses available to him; and in addition, the Supreme Court noted that in view of the circumstances of this case, the three-year interval did not justify the denial.

The standard by which the validity of a guilty plea is judged is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant as affirmatively disclosed by the record. Id. at 1005.

B. THE PROFFER OF EVIDENCE PRODUCED REGARDING THE FACTS THAT EXISTED DOES NOT ESTABLISH INTENT

Utah Code Ann. section 76-5-202 (1953 as amended) defines Criminal Homicide, Murder- First Degree, as a capital offense: if the actor intentionally or knowingly causes the death of another while engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit aggravated robbery.

Rule 11, Utah Rules of Criminal Procedure, was enacted in the 1980 legislative session and was not effective until July 1, 1980. Laws of Utah, 19890 Ch. 14, Section I. As a consequence, it is inapplicable to the plea in this case which was entered June 16, 1980. The applicable standard was articulated in Strong v. Turner, 22 Utah 2d 294, 452 P. 2d 323, 324 (1969). There the Court indicated that a plea must be made voluntarily and with a clear understanding of the charge. When Rule 11 was enacted, guilty

pleas in Utah were governed by Rule 11(e) of the Utah Rules of Criminal Procedure, since repealed, which provided as follows:

The court ... shall not accept [a plea of guilty] until the court has made the findings: ... (4) That the defendant understands the nature and elements of the offense to which he is entering the plea; that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt; and that the plea is an admission of all those elements. (Emphasis added).

Cases interpreting this provision have held that, prior to the decision in State v. Gibbons, 740 P. 2d 1309 (Utah 1987), substantial, and not strict, compliance with Rule 11(e) was required before a court could accept a plea of guilty. In other words, the Gibbons decision, which established the new strict-compliance standard, was without retroactive effect. See, e.g., State v. Hickman, 779 P. 2d 670 (Utah 1989); State v. Copeland, 765 P. 2d 1266 (Utah 1988).

In State v. Hoff, 164 Utah Adv. Rep. 21, 24 (1991), the Utah Supreme Court noted that "where there has been a significant departure from Rule 11 requirements which led to considerable doubt as to whether a defendant's plea was knowingly and voluntary, we have allowed the plea to be withdrawn." The Hoff case, which was decided after Gibbons and therefore involved application of the strict-compliance standard, required a court to consider the defendant's affidavit and his colloquy with the court before the plea could be accepted; see, e.g., State v. Dastrup, 170 Utah Adv. Rep 48 (Ct. of App. 1991), which so interpreted Hoff.

The appellant respectfully submits that, even under the less stringent standard, the trial court's acceptance of his guilty plea in 1980 failed to pass constitutional muster. The facts showing the crime of murder, an element of which is that it was done intentionally is not established by the facts presented to the court. Thus, there would have been no reason for Defendant to plead guilty to murder when it was not committed, unless he believed through misapprehension of nature and element of crime, that he had committed it intentionally.

In State v. Breckenridge, 688 P. 2d 440 (Utah 1983), Defendant appealed the denial of his motion to withdraw his guilty plea to charge of arson. The dispositive question was whether his conviction could stand where there is no record of facts showing that the charged crime was intentionally committed by the defendant. While working at a shop, the defendant decided to dispose of some old parts by igniting them with a torch. The fire spread to the roof and caused extensive damage to the building. Following his arrest the defendant confessed to starting a fire. His confession was admitted at his motion to set aside his plea and in it he is asked if he intended to set fire to the whole shop. The answer was no. On advice of his counsel, he pled guilty to a lesser charge of arson and was questioned on the voluntariness of his plea and whether he was in fact guilty of arson. He admitted to the court that he had intentionally damaged the building and

that he understood the nature of his plea. The Supreme Court overturned the denial and stated:

We will therefore address the issue of the adequacy of his plea on this newly raised ground. We have recognized the importance of avoiding a guilty plea wrongly made because of ignorance. "The court has an undoubted duty to guard against the possibility that an accused who is innocent of the crime charged may be induced to plead guilty without sufficient understanding of the nature of the charge or the consequences of this pleas" Id. citing State v. Harris, 585 P. 2d 450, 452 (Utah 1978). Furthermore, Utah R.Crim.P. 11(e)(4) specifically states that "[t]he court ... shall not accept ... a plea [of guilty] until the court has made the findings: ... (4) That the defendant understands the nature and elements of the offense to which he is entering the plea." No such finding was explicitly made in this case, and indeed could not have been correctly made based on the defendant's pre-trial statements to the prosecutor and to the court at the time the plea was entered.

In State v. Mullin, 400 P.2d 771 (Wash. 1965), the Washington Supreme Court held that in a case where the defendant, in his colloquy with the court, made statements indicating a protestation of innocence and a misunderstanding of the nature of the charges against him, a post-sentencing motion to withdraw the plea should have been allowed.

In language not altogether inappropriate in this case, the court stated:

[W]henever a defendant attempts to make a plea which by its very wording couples a protestation of innocence with an assertion of guilt, the trial court should refuse to accept the plea until the equivocation therein has been eliminated; and, if the defendant persists in attempting to enter such a plea, the trial court should require the defendant to stand trial on the offense charged.

Such a rule is consistent with the orderly and proper administration of justice in criminal cases. It clearly protects the defendant's right to an opportunity to establish his innocence in a trial before a jury.


Id. at 771, citing State v. Stacy, 261 P. 2d 400, 403 (Wash. 1953).

In Mullin, the court stated that denial of the defendant's motion to withdraw his guilty plea, under the circumstances of the case, constituted a denial of due process of law in violation of the state and federal constitutions.

CONCLUSION

The present case involves a manifest injustice, in that the defendant's guilty plea was accepted by the court, notwithstanding the failure of the court to establish a record of acts showing that the charged crime was intentionally committed and the court's failure to explain the defenses available to him. The motion should therefore have been granted. The decision of the District Court should therefore be reversed.

Respectfully submitted this 18 day of August, 1992.

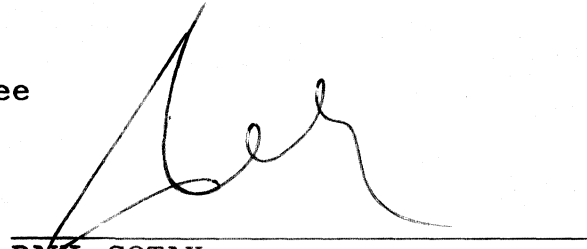


Paul Gotay
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CERTIFICATE OF MAILING

I hereby certify that on this 18 day of August, 1992,
I mailed a true and correct copy, postage prepaid, of the foregoing
Appellant's Brief to:

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EXHIBIT 1

1 IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

2 IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

3 HONORABLE CHRISTINE M. DURHAM, JUDGE PRESIDING

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6 THE STATE OF UTAH,)

7 Plaintiff,)

8 vs.)

9 ROBERT ALAN PHILLIPS,)

10 Defendant.)

Case No. CR-80-296

PLEA,
PENALTY DETERMINATION

11
12
13 Monday, June 16, 1980

14 Tuesday, June 17, 1980

15 Monday, June 23, 1980

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1 MR. IWASAKI: But rather, submit it to the court?

2 THE DEFENDANT: Yes. That is true.

3 THE COURT: All right.

4 Mr. Phillips, did you --

5 MR. METOS: May I also add, Your Honor, --

6 You are also aware, Robert, of the state of the
7 evidence and we have discussed the chances of your being found
8 guilty of a lesser offense and being found guilty of the
9 offense that is charged?

10 THE DEFENDANT: Yah. We have gone through that.

11 THE COURT: All right. After having gone through that
12 with your counsel, Mr. Phillips, do you have an opinion about
13 the evidence against you? Do you think that you are likely to
14 be convicted of the greater offense?

15 THE DEFENDANT: Yes, ma'am. Yes, ma'am, I do.

16 THE COURT: All right. And we will be spending consid-
17 erable time, I think, reviewing that evidence, although, as I
18 understand it, the defendant's plea is entered.

19 And Mr. Phillips, I need you to indicate to me if
20 you are entering your plea of guilty because you are in fact
21 guilty of the offenses that are charged in the Information.

22 THE DEFENDANT: Yes, ma'am, I am.

23 THE COURT: All right. Specifically, the Information
24 alleges that on or about January 1st, 1980, here in Salt Lake
25 County, you caused the death of Everett Hamby, Jr. while you

1 were engaged in the commission of an aggravated robbery?

2 THE DEFENDANT: Yes, ma'am.

3 THE COURT: Are those facts true and correct?

4 THE DEFENDANT: Yes, ma'am.

5 THE COURT: All right. And did you cause his death
6 knowingly and intentionally at that time?

7 THE DEFENDANT: Not intentionally. It was accidental.
8 But I was still at fault.

9 THE COURT: All right.

10 With respect to the intentional part, I will need
11 a proffer from counsel respecting the facts that exist to
12 establish intent.

13 MR. IWASAKI: Your Honor, the facts would indicate that
14 Mr. Hamby was shot once in the back of the head, a bullet
15 going from right to left in an area about a centimeter above
16 the top of his ear, exiting approximately -- atop of his right
17 ear, exiting approximately the middle of the temporal bone on
18 his left ear.

19 Further, the evidence will show, and Mr. Phillips
20 has subsequently confessed to the -- that a second and third
21 shot were placed into the body by Mr. Phillips.

22 Based upon Mr. Phillips' inability to explain the
23 reasons why the second and third shot were fired, it is our
24 opinion, Mr. Metos and myself, that, with a hurdle to pass,
25 the facts would indicate an intentional nature, although in

1 that the gun was clean and reloaded the day of the -- or, the
2 morning after the shots were fired into Mr. Hamby's body,
3 which will account for the dissimilarities.

4 There is no dissimilarity to preclude that from
5 being the same gun merely because of these characteristics and
6 the distortions. ~~It is difficult to say exactly that this is~~
7 ~~the same firearm, or the same cartridge that was spent~~

8 I would proffer at this time State's Exhibit 7-S
9 for that purpose.

10 MR. IWASAKI: I have no objections to that. I would
11 like to make a point of clarification on this matter.

12 The ATF agent did testify at the preliminary
13 hearing. Now, is this report the one that was done
14 subsequent?

15 MR. CHRISTENSEN: This is the report that was done and
16 introduced at the preliminary hearing, and that reflects his
17 testimony as to his report in the transcript at the prelim-
18 inary hearing, explains what he meant and the tests that he
19 performed related to that exhibit.

20 MR. IWASAKI: Because -- Was there another test subse-
21 quent to the preliminary hearing?

22 MR. CHRISTENSEN: Yes. I have got that too.

23 MR. IWASAKI: We haven't seen that one.

24 THE COURT: All right.

25 MR. CHRISTENSEN: Also, Your Honor, I would like to have

1 apartment. And I believe Mr. Iwasaki has seen this also.

2 MR. IWASAKI: That was admitted at the prelim?

3 MR. CHRISTENSEN: Admitted at the prelim.

4 MR. IWASAKI: Yes.

5 MR. CHRISTENSEN: We would offer this also.

6 THE COURT: That will be received, together with
7 everything else that has been offered.

8 MR. CHRISTENSEN: We would ask to be marked as State's
9 Exhibit 17-S the follow-up Alcohol, Tobacco and Firearms
10 report; again, done by Mr. Ed Peterson. And in that direct-
11 ive I asked him and Detective Johnny Johnson asked him to run
12 various tests.

13 We explained to him the position with which Mr.
14 Hamby was shot and found at the time of the robbery. And at
15 that time we asked him if certain tests could be performed
16 respecting the distances involved to refute the contention of
17 the intentional versus the accidental version that Mr.
18 Phillips gave us, and asked him to perform various ballistics
19 tests.

20 We sent him autopsy pictures, we sent him clothing
21 of the victim, and other types of photographs, so that he
22 could run these tests. And in those tests, just in summary of
23 those tests, they ran various aspects in terms of the first
24 shot being fired and how far away that would have been.
25 Because, obviously, the closer the individual is, the more

1 likely it may have been accidental. And the second and third
2 shots that we knew were intentional, Mr. Phillips basically
3 admitted that those were intentional. How far away those
4 would have been fired also.

5 In his report he indicates that the first shot
6 that was fired was in a vicinity from approximately 24 to 30
7 inches away from the accused. The autopsy report will show
8 that the bullet entered the right side of Mr. Hamby's skull a
9 little bit to the left and above the right ear, traversed
10 across the skull and came out at approximately a two centi-
11 meter drop and just to the left of the left ear, the lower
12 portion of the ear, and exited the body. The slug was not
13 recovered and there was no indication whether or not it had
14 ricocheted off the pavement or if it had been lost in the
15 field nearby where he was shot.

16 The second and third shots entered the body cavity
17 in the area of the chest, approximately one-and-a-half inches
18 apart, a fairly close shot group. They were fired from dis-
19 tance in excess of 30 inches. And the disfigured slug that
20 was analyzed and processed was one of the slugs that was found
21 in the chest cavity on the far side of Mr. Hamby's body. The
22 autopsy report would indicate that any one of the three
23 bullets would have killed him.

24 There was a slight amount of bleeding with respect
25 to the second and third gunshot wounds, which is consistent

1 I would indicate to the court that although Mr.
2 Northern has testified respecting certain aspects of the case,
3 he has been less than candid, less than truthful with respect
4 at least to his knowledge and his involvement of what was to
5 take place that day.

6 I do have --

7 THE COURT: What is the basis for that assertion?

8 MR. CHRISTENSEN: I will get to that. If you will just
9 give me a few minutes, I will tell you exactly why we know
10 that.

11 I would ask to have marked a certification,
12 State's Exhibit 20.

13 MR. IWASAKI: No objection.

14 THE COURT: All right.

15 MR. CHRISTENSEN: And as State's Exhibit 21, the autopsy
16 report, which is a three page report done by Dr. Graham and
17 witnessed by Monique Ryser of the medical examiner's office,
18 which, again, indicates the cause of death, indicates the
19 wounds, where they were positioned, and various other aspects
20 that I have represented to the court as to the cause of death.

21 The State's Exhibit 22-S, Your Honor, I have a
22 signed copy entitled a "Waiver of Rights" that was executed
23 by Mr. Phillips, witnessed by Detective Carl Voyles and
24 Sergeant Nievard at 1810 hours on January 9th, 1980, which is
25 a waiver of Miranda rights which was preparatory to his giving

1 introduced for the court. And if as I go along Mr. Iwasaki
2 has an objection to that, he can register it and deal with it
3 at that time. I don't know if he is.

4 MR. IWASAKI: I am not going to oppose the admission of
5 Northern's polygraph.

6 MR. CHRISTENSEN: Some of the concern that the State had
7 initially was the premeditation factor, the planning factor of
8 the alleged robbery, and the murder itself. It initially came
9 down as something that occurred on spur of the moment and may
10 have been an accidental shooting.

11 ~~Mr. Van Sciver~~ Mr. Van Sciver polygraphed Mr. Northern prior to
12 taking a plea, and at that time the State was given the
13 impression that Mr. Northern was not polygraphing because of
14 an erratic heart condition that he has. Nonetheless, in that
15 polygraph it was indicated that Northern lied, at least to his
16 knowing that there was going to be a robbery occur, and that
17 perhaps a killing was to occur respecting the particular
18 robbery in question.

19 THE COURT: Well, now, I need to know whether those
20 results were reliable, or were they affected by the heart
21 condition?

22 MR. CHRISTENSEN: We don't know that with respect to the
23 first test, per se. I have not been privy to that. That was
24 something that was done with defense's privilege, and this
25 sort of thing.

1 THE COURT: I see.

2 MR. CHRISTENSEN: All I know is the representations that
3 have been made to me. As a result of those representations,
4 we had some concern respecting Mr. Northern's involvement.
5 Of course, all along -- Let me just indicate this to the
6 court.

7 Mr. Northern is a very bright young man. He is
8 not a dummy by any means. He has a very high IQ. He is very
9 pathological in the sense of being a manipulative sort of
10 individual. He lied to his attorney, he lied to myself, and
11 in essence lied in many respects as to the case.

12 We had some concerns regarding that. At least
13 culpability in the crime. There were certain types of things
14 he could not lie to, certain types of physical evidence that
15 he was never privy to. And the State would proffer that at no
16 time was Mr. Van Sciver or Mr. Northern ever given full privy
17 as to the exact quantum of evidence that we had or the quality
18 of evidence that we had to corroborate or refute the state-
19 ments that he made.

20 Certain of the statements that he made were
21 relevant and were probative to the intentionalness of Mr.
22 Phillips' guilt. Certain parts of those were out and out
23 lies, primarily respecting his involvement, his age, and his
24 intent.

25 MR. IWASAKI: If I may interrupt at this time, Mike, in

1 towards the back. As he does so, Mr. Northern draws his .22,
2 gets a bead on Mr. Hamby.

3 At that time the fare in the cab is run up to
4 approximately -- between \$26 and \$30. Mr. Northern doesn't
5 know exactly how much that is. But apparently a conversation,
6 according to Mr. Northern, is had.

7 At the time he -- apparently he knows or realizes
8 that Mr. Hamby is apparently a member of his ward, that he
9 knows him auspiciously on a very marginal basis, but does
10 recognize him when they get in the cab, and apparently there
11 is some debate as to whether or not they would rob him.

12 Apparently that debate begins somewhat late in the
13 course of driving around, which consisted of approximately an
14 hour-and-a-half driving around, to which it takes it up to
15 approximately a \$26 or \$30 fare.

16 Mr. Northern contends he tried to talk Mr.
17 Phillips out of the robbery at that time, said he would pay
18 for cab fare, alleges he had approximately \$215 in his pocket
19 at that time.

20 He claims initially that Mr. Phillips has \$50.
21 Later on he claims that Mr. Phillips did not have any money at
22 all and needed the money, and he made the comment to Mr.
23 Northern, "We have got to rob him, because I am not going to
24 pay for my half of the fare," type of a comment.

25 There are inconsistent statements made initially

1 by Mr. Northern in the initial hearing. He indicates that he
2 does not see the first gunshot fired, does not know why Mr.
3 Phillips would want to shoot Mr. Hamby, particularly in view
4 of the fact that during this hour-and-a-half there are conver-
5 sations had about Mr. Hamby's seven children, the fact that he
6 has to work two or three jobs to support them, that they
7 apparently like the individual, they like the man. He puts up
8 no fuss, no struggle, and he, in his first statement, says he
9 can't understand why that would take place.

10 Later on at the preliminary hearing, the statement
11 is made that he saw Mr. Phillips standing from approximately
12 ten feet away with his arm extended in the direction of Mr.
13 Hamby, who at the time of the impact of the first slug was in
14 an all fours position behind the cab with his head facing away
15 from the taillights of the cab down the road.

16 I don't know, and the polygraph does not indicate
17 to me, if it indicates anything to me. It indicates that Mr.
18 Northern did not see that first shot fired. But because of
19 statements made after the fact of the case, he being as bright
20 as he is, or trying to show the State more to make himself
21 look better, makes the comment that he does see that first
22 shot being intentionally fired.

23 The allegation is made by Mr. Phillips in his
24 statement that after the first shot was accidentally fired
25 that he runs around to the driver's side of the cab to drive.

1 let off on the trigger, and the gun discharged into the bed
2 and into the floor.

3 Two or three days ago we did go to the apartment,
4 it is under new tenancy now, and did recover a slug which
5 appears to be a .357 Magnum slug in the proximity where Mr.
6 Northern says we could find that slug.

7 There is -- There may be some consideration that
8 that went off two days before, according to Mr. Phillips'
9 version of that, and that there were other witnesses who could
10 have heard the shots being fired. And of course, there is no
11 way to prove or disprove that unless the people would be iden-
12 tically or exactly sure.

13 This may be also part of the basis for Mr.
14 Phillips' claiming accidental discharge of a weapon. The
15 indication that it perhaps did accidentally discharge as the
16 hammer was being released could have been the basis for the
17 defense in the initial confession he gave to the police.

18 Our ballistics, however, indicate a well aimed
19 shot. Our ballistics and the positions that were given to the
20 officers that took the statement indicate that at the time
21 that Mr. Hamby was being robbed he was in basically a prone
22 position on the ground, that Mr. Phillips was standing to his
23 right side closest to his head area, and that Mr. Phillips, or
24 Mr. Hamby, was taking the money and his personal property out
25 of his pockets and placing them in front of him on the ground

1 THE COURT: All right. Thank you very much, Mr.
2 Christensen.

3 Does that complete, then, the State's presenta-
4 tion with respect to the facts in this case?

5 MR. CHRISTENSEN: Yes. Other than -- At this time I
6 believe 1-S, 14-S, 18-S, 19-S, 21-S, and 22-S have not been
7 accepted. We would move for their introduction at this time.

8 THE COURT: Are there any objections to the receipt of
9 those?

10 MR. IWASAKI: No objection to any of those.

11 THE COURT: All right. All of those exhibits will be
12 received.

13 At this point, as I understand it, we are going to
14 recess in this hearing until Monday morning at 10:00.

15 MR. IWASAKI: No.

16 THE COURT: All right.

17 MR. IWASAKI: That is not my understanding, Your Honor.

18 It is the State's position that these are the
19 reasonable inferences. Before we recess and have you go in
20 only with the State's case in mind, theory in mind, I would
21 obviously like an opportunity to give -- it is not my position
22 to argue with what has been said, but, rather, to point out
23 other reasonable inferences from the evidence.

24 THE COURT: All right.

25 MR. IWASAKI: And I think that is essentially based upon

1 what has been presented by Mr. Christensen at this time.

2 To begin with, Your Honor, it is uncontroverted
3 that most of what Mr. Northern has testified or has stated to
4 Mr. Christensen has been his third statement, once under oath,
5 and he has since recanted that statement. We have two author-
6 ities as to what happened that night, what happened weeks
7 before, and then the planning procedure.

8 It is our position that Mr. Northern's multiple
9 statements are so contradictory that, as the old jury instruc-
10 tion says, you can believe one against him or many against
11 him. However, if you found that someone has lied on a mater-
12 ial fact, then you can disregard all of the testimony.

13 I am not asking you to disregard all their testi-
14 mony, because the one main thing that is uncontroverted is
15 both Mr. Phillips' and Mr. Northern's admission that it was
16 Mr. Phillips that shot Mr. Hamby.

17 Unfortunately, and under whatever circumstances, I
18 think that is the whole issue of the case. The whole issue in
19 the case comes down to first versus the second degree murder.

20 We have pleaded -- We have admitted our involve-
21 ment, in fact, that would indicate a first degree murder, and
22 we have done that after plea yesterday by stating that yes, he
23 did fire those shots, and under circumstances which would lead
24 one to believe that it was intentional and knowing.

25 As to a review of the evidence, I think it all has

1 to be taken with an extremely large grain of salt as to what
2 Mr. Northern is saying at this time. You can see the pattern
3 that is developing in Northern's different statements.

4 At first he acknowledges no knowledge whatsoever
5 of the robbery, but then does place blame upon Mr. Phillips.
6 Later he does acknowledge the robbery, as well as his pulling
7 of the gun on Mr. Hamby, but then goes into greater detail as
8 to what he saw.

9 It is, further, very important, Your Honor, to
10 realize that during the second polygraph test one of the first
11 -- one of the main questions asked of Mr. Phillips was, "Did
12 you lie --" -- of Mr. Northern was, "Did you lie when you said
13 that you saw Mr. Phillips aim and fire that first shot?" He
14 was found to be deceptive on that matter, extremely deceptive.

15 That is the whole issue, who saw that first shot.
16 No one saw that first shot except for Mr. Phillips, and Mr.
17 Phillips' statement, which he has made once after a waiver, a
18 full confession adding up almost tantamount to the first
19 degree murder charge, he admitted that he shot Mr. Hamby, but
20 under circumstances which I would indicate to the court is
21 different. As Mr. Christensen has stated, the body positions
22 would have such indications in Mr. Phillips' statement that
23 Mr. Hamby was in fact on all four.

24 Mr. Northern was walking away from the scene at
25 the time. Mr. Phillips was in this situation with his right

1 hand toward the victim's body, and he was bending over in an
2 awkward position to pick up the money, and the gun in fact
3 discharged.

4 It is not coincidental that the gun would dis-
5 charge and hit a vital area at such close distance. It is not
6 coincidental that such a large gun could actually -- would
7 actually cause scalp and hair to move and you could see that.

8 The inference of the State is that it was a well
9 planned shot. However, if you will look at the autopsy
10 report, and it is, as Mr. Christensen stated, the bullet goes
11 in on the right side, a bit -- about three centimeters above
12 the temporal bone, two-and-a-half to three centimeters from
13 the temporal bone, excuse me, at the temporal bone on the left
14 side, indicating a flat trajectory.

15 It is a ~~flat trajectory~~. It is one which would --

16 THE COURT: Well, I am sorry. I don't understand the
17 inference that it is a flat trajectory if there is a two
18 centimeter drop. Wouldn't that indicate a slight angle?

19 MR. IWASAKI: It is an angle of two centimeters. That
20 is correct.

21 THE COURT: All right. But likely a flat trajectory
22 which would be consistent with Mr. Phillips' statement that as
23 he bent down and picked up the money he was down at the level
24 of Mr. Hamby at the time. There is no doubt that Mr. Hamby,
25 was on all four.

1 MR. IWASAKI: We have a question that it was in a
2 front position or not. Northern doesn't help us out at all,
3 because Northern has changed his statement two or three times
4 regarding what he saw basically to the point where he saw
5 nothing at all.

6 You have to look at Phillips' statement. You have
7 to look at Rob Phillips' statement as to what he said, and
8 that is consistent with what he said, that Hamby was on all
9 fours and as he was reaching down at a level consistent with a
10 -- more or less a flat trajectory, the gun did in fact dis-
11 charge.

12 It was not, Your Honor, an execution type slaying.
13 The gun -- The trajectory of the bullet would not be consis-
14 tent with someone standing over somebody and shooting them in
15 the side of the head. It would be a much more severe angle.
16 They would have to get down and be level with them to cause
17 this kind of trajectory.

18 Mr. Phillips is a small man, his arms are small.
19 The distance between the time -- The distance between the
20 bullet and Mr. Hamby's head is consistent; 24 inches. ~~Twenty-~~
21 four inches is very close, especially when Hamby is taking out
22 property and putting it in front of him, at which angle he is
23 -- Phillips is within 24 inches of him by the gun. So it is
24 consistent with the ballistics at that time.

25 Northern did work for Ute Cab. Northern did have

1 the knowledge of previously knowing Mr. Hamby, or in a -- or,
2 at least seeing his face around. I am not saying at this time
3 that that was the motive for the execution, but I think that
4 is reasonable. That is a reasonable inference to be drawn.

5 It wasn't Philips that was identifiable by Hamby.
6 It wasn't Phillips that drove the cab to know how much money
7 was going to be involved in a day after a holiday. It was
8 Northern.

9 I can't impress upon the court enough to look at
10 all of the statements, especially the multiple statements of
11 Mr. Northern, and also the oral proffer made by Mr.
12 Christensen. Because those statements are not put in a
13 transcript. Those statements are all oral statements made to
14 Mr. Christensen, of which I have no doubt that they were made,
15 and I have no doubt that he is making them in good faith here.
16 But they are not down on paper, and so Your Honor would have
17 to look at all of the facts and circumstances, including the
18 preliminary hearing transcript.

19 The preliminary hearing transcript would indicate,
20 and also the medical reports would indicate, that while there
21 was a pool of blood underneath the body of the victim at the
22 time, it was not a massive amount of blood stemming from the
23 chest wounds.

24 Upon my questioning of Monique Ryser at the
25 preliminary hearing, she stated that it would be consistent

1 with the blood that was there and the blood stemming from the
2 head cavity, that the first shot was in fact of the head. So
3 we have no question of that.

4 And so the second and third shots, the lack of
5 blood that you would expect on second and third shots into the
6 body, it was not present, which would indicate there was a
7 lapse of time, and that it was taken back again and there were
8 two more shots fired into it.

9 The inference that the State would have one
10 believe was that those two shots were done very well aimed and
11 planned. However, as you look at it in Mr. Phillips' state-
12 ment, he fires two shots in rapid succession. There needn't
13 be any need for aiming. If the first shot hit something, the
14 second shot would indicate, the patterns would indicate, that
15 it was a bang, bang kind of approach as he was walking around
16 to the other side of the cab.

17 At that time, based upon military experience, or
18 even based upon the knowledge of the damage a .357 would make,
19 Mr. Hamby, of course, was already dead at that time.

20 To impress upon the court the issue as I see it,
21 the main issue in this case is whether or not that first shot
22 was intentional.

23 There was only one person who saw that first shot,
24 and that was Mr. Phillips. He was not able to testify about
25 it. Mr. Northern did not see that first shot, and anything

1 concerning that first shot, what he saw and what Mr. Phillips
2 did, is an admitted lie, because he did not see that.

3 I think that you have to examine all of the state-
4 ments, including Mr. Phillips' statement that he gave volun-
5 tarily after signing the waiver, to determine the issue in my
6 mind as to the -- the full culpability of Mr. Phillips in his
7 actions. And once again, I state that we did admit our
8 actions in that matter, but I do believe it is subject to
9 different inferences and interpretations.

10 I will probably do a lot more on Monday as to
11 closing on this matter. But then, these are the points that I
12 felt are important at this time, just so the court will have
13 that into consideration while you are reviewing all the
14 matters.

15 THE COURT: All right. Thank you very much.

16 Do you have anything further this morning, Mr.
17 Christensen?

18 MR. CHRISTENSEN: No, Your Honor.

19 THE COURT: All right.

20 The court has received the exhibits that have been
21 placed into evidence today. I am planning to spend some time
22 this afternoon reviewing them and some of the cases that have
23 been cited to me on legal questions which are before me.

24 We will be in recess with respect to this case
25 until 10:00 o'clock Monday morning, when I anticipate the

EXHIBIT 2

Paul Gotay (1224)
Gotay Law Office
Attorney for Defendant
5085 South State Street
Murray, Utah 84107
Telephone: (801) 265-2883

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

| | | |
|-----------------------|---|-----------------------------|
| THE STATE OF UTAH, | : | |
| Plaintiff, | : | AFFIDAVIT OF ROBERT |
| | : | ALAN PHILLIPS |
| vs. | : | |
| ROBERT ALAN PHILLIPS, | : | Case No. CR-80-296 |
| Defendant. | : | Judge <i>Michael Murphy</i> |

State of Utah)
County of Salt Lake) ss.

Robert Alan Phillips, being first duly sworn, deposes and says:

1. I am the defendant in the above-entitled action.
2. I am of adult years and fully competent to testify, and I make this affidavit on the basis of my personal knowledge.
3. After my sentencing in this case, as I reflected on the procedure used by the court in accepting my plea-bargain, I recognized that certain improprieties may have been committed, and that I may have had a valid defense to the charge: namely, that the killing, not being intentional, might not have amounted to murder.
4. I attempted to secure counsel in an effort to withdraw my plea, but no attorney with whom I spoke expressed any desire to take the case, until I hired Mr. Paul Gotay in approximately

November of 1991.

5. My previous efforts to secure counsel are summarized as follows:

a. In October, 1983, I contacted Loni F. Deland, who indicated he would be unable to represent me due to a conflict in his schedule.

b. In about May of 1984 I received a letter from J. Bruce Savage, who sought to dismiss a motion I had previously filed with the court in connection with this case; but I considered that his actions were not undertaken in my best interest, and accordingly did not feel that I could trust him.

c. Sharyn Kelly, CSR, informed me in March, 1988, that my requested hearing transcript would cost \$825.00; but later she reduced this to \$625.00, which I paid her. The first copy of the transcript had been sent to my attorney, and I was unable to get it back.

d. In April of 1988 I took a paralegal course, during which I became convinced that I could not represent myself in this matter, and that I needed an attorney.

e. In December, 1989 I was informed by the American Civil Liberties Union that they were unable to help me.

f. During the month of April, 1990, I was informed by three attorneys -- Michael H. Wray, David Brown, and Randy Richards -- that they were unable to take my case.

g. In October, 1990, Craig S. Cook expressed interest in handling this matter, but changed his mind two months later.

h. Mr. Gotay agreed on November 9, 1991, to handle my

case.

Further affiant saith not.

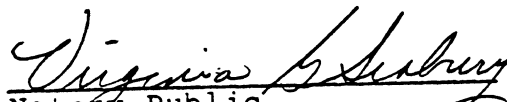
Dated this // day of February, 1992.


Robert Alan Phillips

State of Utah)

County of Salt Lake) ss.

On the // day of February, 1992, personally appeared before me Robert Alan Phillips, who being first duly sworn upon oath, signed the foregoing affidavit in my presence, and stated that the matters contained therein were true and correct, to the best of his information and belief.


Notary Public

Residing at _____
My commission expires _____

